## SUPPORTING BRIEF.

### I.

Index to brief is included in Index to Petition, *supra.*

### II.

### The Opinion of the Court of Appeals.

This opinion was filed June 4, 1942, but is not yet reported.

### III.

### Grounds on Which Supreme Court Jurisdiction Is Invoked.

This application for writ of certiorari is made upon authority of section 240-a of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stats. 936 and section 5-b of Rule 38 of this Court; and upon the grounds:

(1) That the said Circuit Court of Appeals has decided, herein, an important question of local law in a way probably in conflict with applicable local decisions; and

(2) Certiorari should be granted to fix the measure of proof required to justify the Circuit Court of Appeals in reversing a concurrent finding of fact, based on inferences from oral testimony in conflict with deductions from other evidence, by a Master and District Court, if this Court should decide (contrary to our opinion), that the Circuit Court of Appeals for the Fourth Circuit has in fact reversed such concurrent finding herein.

The date of the Decree sought to be reviewed is June 4, 1942. The mandate was stayed by Order of July 2, 1942, for thirty days, and by Order of June 30 for twenty days.

## IV.

### Statement of Case.

This is an action for cancellation of an insurance policy for $5,000.00 on the life of Eugene B. McSweeney, with his wife, petitioner, as beneficiary, upon the ground that he was guilty of fraud in stating in the application that he had not had high blood pressure and that Dr. Boyd was the only physician who had treated him within the preceding three years, which statements were not true (R. 10 & 11). The insured having died before the trial, petitioner by supplemental answer set up a cross action for recovery of the amount of the policy. The Court ordered a Special Master to hear the evidence and make and report his findings of fact and law (R. 8). The Master found that the insured had no conscious design or intent to deceive or defraud in making the untrue answers (R. 14), but that, as a matter of law, under the South Carolina decisions, such intent or design was not necessary for cancellation (R. 14).

The District Judge Designate, Hon. A. W. Barksdale of Virginia, adopted the Master's findings of fact and law (R. 32), and the Circuit Court of Appeals affirmed the judgment (R. 45), upon the ground, as we understand the decision, that the South Carolina law, as expounded in *Johnson* v. *N. Y. Life Insurance Company*, and other cases, 165 S. C. 494, does not require the insurer in such cases to prove by *evidence in addition* to the mere signing of the application containing the untrue answers that the insured had a *conscious* intent or design to deceive or defraud the insurer (R. 42); and with that construction of the decisions of the South Carolina Supreme Court, in mind, the Court then held (R. 43):

> "In the second place, the case was one heard in equity and not at law; and this court has *full power* to re-

view the findings of fact. We entertain no doubt upon the evidence appearing in the record that the making of the false answers in the application as to matters inquired about, which were false to the knowledge of the applicant when making them, established fraud vitiating the policy *within the holding of the Johnson Case.*"

The policy in question also provided "* * * and all statements made by the insured in the absence of fraud shall be deemed representations and not warranties * * *." (R. 3).

## V.

### Specification of Assigned Errors.

1. The decision herein is in conflict with the law of South Carolina, as expounded by its highest court in many cases that in actions of this character the insurer must prove as a matter of fact, by clear and convincing *evidence, in addition to the mere signing of the application* containing the false answers, that the insured had an *actual or conscious intent or design to deceive and defraud* the insurance company in making the answers complained of.

2. The decision herein is in conflict with the decisions of other Circuit Courts of Appeals as to the measure of proof required to make such a concurrent finding of fact "clearly erroneous" within the meaning of Rule 52-a of the Rules of Civil Procedure, if this Court should construe the decision herein (contrary to our construction thereof) as reversing the concurrent finding of fact by the Master and District Judge, based on inference from oral testimony in conflict with deductions from other evidence, that the insured herein had no conscious intent to deceive and defraud the insurance company.

## VI.

### Specification No. 1.

Confidently we assert that the well settled law in South Carolina, as shown in the following cases, is that the insurer must:

(a) bear the burden of proving that there was *conscious* intent or design of the insured to deceive or defraud; and

(b) prove such conscious intent or design *by evidence in addition to* insured's signature to the application containing the untrue answers.

On this point the Master says:

> "As I have already stated, the evidence in this case falls far short of convincing me that the insured had an actual conscious intent to defraud the insurance company. On the question of intent it is impossible to say what was in Mr. McSweeney's mind when he stated that he had not consulted a physician other than Dr. Boyd, or had never had high blood pressure. Bearing in mind the evidence of the good character of the insured which, under the South Carolina decisions, is an element to be considered, *and the further fact that the insured, when he answered the questions, may have honestly thought that he had recovered from the condition about which he had been previously advised by Dr. Levy, it is not unreasonable to assume that he had no conscious design or intent to defraud the insurance company.* If, under the law of South Carolina, it is necessary for complainant to establish an actual design or scheme to defraud then the relief by way of cancellation should be denied. The question is not free from doubt and in fact has given me a great deal of concern by reason of certain general statements in some of the South Carolina decisions, to which I will later refer. Nevertheless I have reached the conclusion that under the law of South Carolina material representations, such as those here involved, relied on by the

> insurance company, which were untrue, and known by the insured to be untrue when made, invalidate the policy even in the absence of proof of a conscious scheme or design on the part of the insured to defraud the insurance company."

And the Circuit Court of Appeals says:

> "We do not find it necessary to explore that distinction. We think it clear that fraud of the sort required to avoid the policy is shown to exist where there is a false representation as to a material matter, which is false to the knowledge of the applicant at the time it is made and which is made for the purpose of being acted on by the company. Where these facts appear, it is idle to inquire further whether there was intent to defraud; for the intent to defraud in such case is the intent to obtain the policy by the false representations. Any question as to whether the insured may honestly have thought that he had recovered from the serious ailment from which he knew that he had suffered and for which he had consulted a physician is beside the point." (R. 42).

In the following South Carolina cases, this question arose in actions at law, and the purpose of the State Supreme Court was simply to establish and continue to apply the law of this state as to these two prerequisites to cancellation and avoidance of life insurance contracts for fraud.

*Huestess* v. *South Atlantic,* 88 S. C. 31. The answers as to diseases, injuries, treatments, and physicians, were false. Insured wrote his signature at the required places. The agent and also the examining physician were undoubtedly guilty of fraud. Whether or not insured was guilty of fraud was disputed, but the Circuit Judge held that he was, and granted a non-suit. What kind of fraud? The Supreme Court says:

> "Under these circumstances, the question whether the insured was guilty of CONSCIOUS fraud should have been submitted to the jury."

Next, *Wingo* v. *N. Y. Life,* 155 S. C. 206. The following excerpts sufficiently give the facts, and show that *"intent to deceive," "A wicked intent"* is necessary for cancellation, and that it must be proved by clear and convincing evidence:

> "But, assuming that question 9 reasonably suggested to the applicant his duty to answer if he had aforetime consulted a physician thereabout, and that the answer 'No' was a response to that question, yet such an answer is only fatal when it is prompted by the intent to deceive. That inquiry involves a secret operation of the mind, and the circumstances before recited do not leave the issue free from reasonable doubt.
>
> "In this connection the eighth exception is relevant. Nobody will deny that in a court of equity the rule prevails that fraud must be proved by clear and convincing testimony, and that because it involves the wicked intent."

*Southeastern* v. *Palmer,* 129 S. C. 432. While this decision appears to be based both upon the question of conscious fraud and upon the fact that there was evidence that the company did not rely upon the false answers, still, the Court follows, with approval, the *Huestess* case, saying:

> "As to whether there was fraud on the part of the applicant was a question for the jury. Conscious fraud could not be inferred from mere inaccurate answers, especially when the answers were written by the agent of the company, and the testimony shows a subsequent thorough investigation by the company of the applicant's physical condition, independent of the answers of the applicant.
>
> "His honor committed no error in submitting the case to the jury for their determination. Under the case

of Huestess *v.* South Atlantic Life Insurance Company, 88 S. C., 31, 70 S. W., 403, a case very similar to this, this Court says in the opinion:

"'There is no direct or positive testimony tending to show that the insured intended to practice a fraud upon the defendant other than the mere inference, arising from the signing of the application for insurance, containing the answers alleged to be false.'

"In that case this court held that under the circumstances the question whether the insured was guilty of conscious fraud should have been submitted to the jury."

In *Stewart* v. *Pioneer Pyramid Life*, 177 S. C. 132 (1935), the Court says:

"We may dispose of the second of these propositions in a few words. It was a question for the jury to say whether the insured *intentionally and for the purpose of committing a fraud* on the insurer, concealed material facts from the insurer. *This is the settled rule of this jurisdiction.*"

and again, quoting from the *Johnson* case:

"Where a statement of fact in an application is only a representation, *its mere falsity is not sufficient to avoid the policy,* its materiality and the good faith of the applicant in making it being important considerations. Under the issues made in the case at bar, it would be necessary for the defendant to show that the statements in the application relied on to defeat the policy were untrue, that their falsity was known to the applicant, that they were material to the risk and relief on by the insurer, *and that they were made with intent to deceive and defraud the company.*

Other South Carolina cases to the same effect are treated in footnote.[4]

[4] In *Rogers* v. *Atlantic Life,* 135 S. C. 89 (1926) the appeal was from refusal of the trial Judge to direct a verdict for insurer, one of the questions being "have you ever undergone any surgical operation" to which the answer was untrue. The Supreme Court says:

"The question as to whether James A. Rogers, in answering "no" to these questions, *intended to defraud and deceive the insurance company* was properly, under the testimony, submitted to the jury."

"In *Johnson* v. *New York Life,* 165 S. C. 494 (1932), the South Carolina Supreme Court directed that a verdict be entered for the insurer upon the ground that no reasonable inference could be drawn from the evidence other than that the insured *deliberately intended to deceive* the company and thereby procure the insurance. That intent was the only inference that could be drawn from the testimony, showing that insured was a confirmed drunkard, that during the five years preceding the application he had been treated by physicians, which he denied, for alcoholism on ten different occasions, on one of which he was confined to a hospital, that some of such periods of illness would last from one to four weeks. Insurer did not seek to cancel the policy on misrepresentations as to use of alcohol, but the testimony was considered for the purpose of showing the nature and extent of the ailment for which he was treated and his intent in answering untruly.

*"The principles of law applied in the decision are that there must be intent to deceive, and that as to this, "the mere signing of the application containing the answers alleged to be false is not conclusive."*

In *Suggs* v. *New York Life,* 174 S. C. 1 (1934), the Court quotes from the decision in *Johnson* v. *New York Life,* as follows:

"Finally, the intent with which representations or misstatements of facts are made is a thing that is locked up in the heart and consciousness of the applicant. It may be shown by his express words, or it may be deduced from his acts and the facts and circumstances surrounding the making of the misrepresentations, though on this question the mere signing of the application containing the answers alleged to be false is not conclusive. *Huestess* v. *Inc. Co.,* 88 S. C. 403." (Italics added by the Court.)

In the dissenting opinion, Mr. Justice Bonham quotes from the *Johnson* case, as to misrepresentations, that the insurer must show "that they were made with intent to deceive and defraud the insurance company" and says: "We will apply that yardstick to the present case."

*Livingston* v. *Union Central Life,* 120 S. C. 93. In his concurring opinion, the brilliant Mr. Associate Justice Maron says:

"In the light of the foregoing consideration, so pointedly recognized in the exercise of the legislative power of the state, I think there are salutary reasons, *grounded in sound public policy,* for not applying the rule that the erroneous or untrue but not fraudulent representation of a material fact by an applicant will avoid or forfeit a life insurance policy after a right of action has accrued thereon and the lips of one of the parties to the contract have been effectually sealed by death."

The case of *Murray* v. *Metropolitan,* 193 S. C. 368, relied upon by the Circuit Court of Appeals, involving *reinstatement* of a policy, is easily distinguished from cases involving misrepresentations in an application for the *issuance* of a policy. The contract between the parties is wholly different and the only things considered were the terms of the contract and the falsity of the answers. The court below has certainly misinterpreted the *Murray* case, wherein it is said:

> "The appellant complains that the lower Court erred in refusing its motion for the direction of a verdict upon the ground that the Court should have held that the only reasonable inference to be drawn from the evidence was that the answers to the question in the application were material and untrue, and therefore, *according to the specific agreement contained in the reinstatement application,* the defendant was under no liability for a period of two years, and was within its rights in declaring the policy null and void.
>
> "With the application for reinstatement in evidence, and with the undisputed testimony submitted by the defendant showing the falsity of the representations therein made, it conclusively appears that the motion for a directed verdict should have been granted unless there was also evidence of waiver to take the case to the jury."

*Atlantic Life Insurance Co.* v. *Hoeffer,* (4th Cir.) 66 F. (2d) 464. We merely call attention to the fact that this decision was rendered prior to *Erie R. R.* v. *Tompkins.*

## VII.

### Specification No. 2.

The decision herein is in conflict with the decisions of other Circuit Courts of Appeal as to the measure of proof required to make such a concurrent finding of fact "clearly

erroneous'' within the meaning of Rule 52-a of the Rules of Civil Procedure, should this Court construe the decision herein (contrary to our construction) as reversing the concurrent finding of fact. Some of these decisions are:

Third Circuit. *Floridin Co.* v. *Clay,* 125 F. (2d) 669 (in equity) holding:

> "This finding is supported by substantial evidence and is thus controlling here on appeal."

First Circuit. *U. S.* v. *State St. Trust Co.,* 124 F. (2d) 948 (action to recover income taxes) holding:

> "A finding cannot be set aside unless it is clearly erroneous, that is, against the clear weight of the evidence."

Eighth Circuit. *Adair* v. *Reorganization Inv. Co.,* 125 F. (2d) 901 (action to recover assessment or bank stock) holding:

> "* * * and its findings are presumptively correct, unless some obvious error of law has intervened or some serious mistake of fact has been made."

Fifth Circuit. *Texas Agri. Assn.* v. *Hidalgo,* 125 F. (2d) 829 (in equity) holding:

> "as this is a suit in equity, we are not bound by the conclusions of the District Court and may look to the entire record in deciding the case."

Ninth Circuit. *Smith* v. *Royal Ins. Co.,* 125 F. (2d) 222 (action on fire policy) holding:

> "The doubtful issue should have been resolved against the party upon whom rested the burden of proof."

In the decision herein, the court below merely states that it has *full power* to review the findings of fact. If it has, in fact, reversed this concurrent finding of fact, then

"full power" must mean the power to ignore the oral testimony, and is therefore not akin to "clearly erroneous."

Frankly, however, we do not think that the finding of fact has been reversed, because the Court says that the evidence establishes fraud vitiating the policy *within the holding of the Johnson case,* and we think the error really lies in its construction of the *Johnson case* and other South Carolina decisions.

Respectfully submitted,

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